

**BEFORE THE
FEDERAL MOTOR CARRIER SAFETY ADMINISTRATION**

In the Matter of:

SHANAHAN CHAMPION, INC.,

Respondent.

**Docket No. FMCSA-2006-25346¹
(Eastern Service Center)**

ORDER APPOINTING ADMINISTRATIVE LAW JUDGE

1. Background

On April 21, 2006, Claimant, the Field Administrator for the Eastern Service Center, Federal Motor Carrier Safety Administration (FMCSA), issued a Notice of Claim (NOC) to Respondent, Shanahan Champion, Inc., proposing a civil penalty of \$1,300 for alleged violations of the Federal Motor Carrier Safety Regulations (FMCSRs). The NOC stated that it was based on a February 5, 2006, roadside inspection of a commercial vehicle operated by Respondent. Specifically, the NOC charged Respondent with: (a) one violation of 49 CFR 390.19(a)(2), with a proposed civil penalty of \$300, for failing to file a Motor Carrier Identification Report (Form MCS-150) every 24 months, in accordance with the specified schedule;² and (b) one violation of 49 CFR 392.9a(a)/13902,³ with a proposed civil penalty of \$1,000, for operating a motor vehicle providing transportation requiring operating authority without the required operating

¹ The prior case number of this matter was NJ-2006-0235-US0170.

² The filing schedule is now contained at 49 CFR 390.19(b)(2); see 73 Fed. Reg. 76821, December 17, 2008.

³ "13902" should have been cited as "49 U.S.C. § 13902."

authority.⁴

On May 8, 2006, Respondent replied to the NOC, denying both allegations.⁵ Respondent contended that it could not have been the carrier responsible for the February 5, 2006, operation because the company was closed for over three years; it had cancelled its insurance policy and informed all of its customers of this action. Respondent also averred that it was not aware of any vehicle operating under its USDOT number "746797." In addition, with respect to the alleged violation of section 390.19(a)(2), Respondent alleged that it never failed to file a required report when it was in operation. Respondent submitted in evidence a computer printout of the company "Snapshot" from FMCSA's SAFER database,⁶ demonstrating that it last filed a MCS-150 Form on July 7, 2001, and as of May 8, 2006, it had no insurance coverage.⁷

On July 10, 2006, Claimant submitted his evidence, arguing that the Driver Vehicle Examination Report obtained from the State of Ohio confirmed that a commercial motor vehicle was operated by Respondent on February 5, 2006, in interstate commerce. Claimant also alleged that the FMCSA records demonstrated that Respondent's registration had lapsed and Respondent had failed to file a MCS-150 Form

⁴ Claimant submitted some of the same evidentiary documents twice – as exhibits to the "Field Administrator's Submission of Evidence" (Claimant's Evidence) and as attachments to the "Submission of Evidence and Memorandum of Law in Support of Submission of Evidence" (Claimant's Memorandum). For the Notice of Claim, see Exhibit A to Claimant's Evidence and Attachment 2 to Claimant's Memorandum. In addition to attachments, exhibits are also contained in Claimant's Memorandum; these exhibits are cited in the Affidavit of Danny Swift, which is Attachment 1 to Claimant's Memorandum. There are also exhibits to attachments other than the affidavit. See note 8, *infra*.

⁵ See Exhibit B to Claimant's Evidence and Attachment 3 to Claimant's Memorandum.

⁶ SAFER is FMCSA's Safety and Fitness Electronic Records System, which may be found on the internet at <http://www.safersvs.org/>.

⁷ See Exhibit B to Claimant's Evidence and Attachment 3 to Claimant's Memorandum.

in accordance with the required schedule. Moreover, Claimant averred that Respondent's Reply contained only a general denial and offered no evidence to rebut the allegations.

2. Discussion

Respondent's allegation regarding the dissolution of its business more than three years ago raised a material fact in dispute. The Ohio State Highway Patrol Report⁸ submitted by Claimant is unsigned, and there is no supporting evidence explaining how the inspecting officer determined that the commercial motor vehicle belonged to Respondent. Moreover, in determining the amount of civil penalty for the violation under section 390.19(a)(2), Claimant used the "Carrier Roadside Penalty Assessment Worksheet for Safety Violations (per Violation)" (Roadside Worksheet);⁹ and for the violation under section 392.9a(a), Claimant used the "Commercial Penalty Assessment Worksheet (per Violation)" (Commercial Worksheet). Both Worksheets contained common factors for some "considerations," such as "Gravity" and "Ability to Pay/Stay in Business." For the same reasons set forth in *In the Matter of Thomas Hammond*,¹⁰ and *In the Matter of Peter Pan Bus Lines, Inc.*,¹¹ the calculation methodology under this type of worksheet is flawed.

For example, in this matter, as in those cases, Respondent received points, probably increasing the civil penalty, based upon its ability to pay the penalty. The

⁸ See Exhibit 1 to Attachment 1 to Claimant's Memorandum and Exhibit 1-1 to Attachment 5 to Claimant's Memorandum.

⁹ Claimant did not submit a Penalty Assessment Table for the Roadside Worksheet; instead, there was a handwritten amount of "\$300.00" at the bottom of the Roadside Worksheet.

¹⁰ See *In the Matter of Thomas Hammond*, Docket No. FMCSA-2003-15980, Final Order, January 24, 2006, at 5-7.

¹¹ See *In the Matter of Peter Pan Bus Lines, Inc.*, Docket No. FMCSA-2003-14655, Final Order, August 6, 2003, at 15-16.

proposed civil penalty should be determined before the ability to pay that civil penalty is considered. Furthermore, not only do the ranges of points differ for each of the “considerations,” but assigning one point for “Unlikely to cause/contribute to accident” under the “Gravity” consideration is not warranted.¹² In addition, although the Commercial Worksheet stated that the statutory minimum penalty for a registration violation by for-hire motor carriers of property is \$550, the Penalty Assessment Table¹³ showed the minimum penalty for the violation to be \$1,000. Yet no explanation was given as to why the worksheet adopted a higher minimum civil penalty than the statutory minimum amount.

Because there is a material fact in dispute concerning whether the commercial motor vehicle belonged to Respondent, and because Claimant used a flawed methodology to determine the amount of civil penalty, this matter is being assigned to the Office of Hearings of the United States Department of Transportation.¹⁴

3. Appointment of Administrative Law Judge

In accordance with 49 CFR 386.54, an administrative law judge is hereby appointed, to be designated by the Chief Administrative Law Judge of the Department of Transportation, to preside over this matter and render a decision on all issues, including the civil penalty, if any, to be imposed. The proceeding shall be governed by subparts D

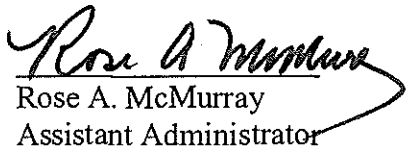
¹² Moreover, there is no explanation for the difference between “Reasonably caused/contributed to accident” and “Caused/contributed to accident.”

¹³ The “Note” above the Penalty Assessment Table stated that the Table applies only to Mexico-domiciled carrier operations. Claimant did not demonstrate that Respondent was a Mexico-domiciled carrier; nor did he explain why the Table was applicable to Respondent, if it was not a Mexico-domiciled carrier.

¹⁴ Even though Respondent did not request a formal hearing, 49 CFR 386.16(b)(4)(C) provides, in pertinent part: “[n]othing in this section shall limit the Assistant Administrator’s authority to refer any matter for formal hearing....”

and E of 49 CFR 386 of the Rules of Practice, and all orders issued by the administrative law judge.

It Is So Ordered.


Rose A. McMurray
Assistant Administrator

Federal Motor Carrier Safety Administration


Date

CERTIFICATE OF SERVICE

This is to certify that on this 1st day of June, 2009, the undersigned mailed or delivered, as specified, the designated number of copies of the foregoing document to the persons listed below.

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